In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 504

JOSEPH F. SCHIPANI, PETITIONER

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on five counts charging him with willfully attempting to defeat and evade income taxation for the years 1956 through 1960. He was sentenced to three years' imprisonment and fined $12,500. The conviction was affirmed by the court of appeals. 362 F. 2d 825. A petition for a writ of certiorari was filed on August 29, 1966. The government filed a memorandum in opposition to the granting of the petition on September 30, 1966, and certiorari was denied by this Court on November 7, 1966. As yet no petition for rehearing has been filed, and under Rule 58(1) of this Court the time within which to file a petition for rehearing, if not extended, will expire on December 2, 1966.

239-871—66

In light of this Court's continuing jurisdiction over the cause, we submit this supplemental memorandum to advise the Court of the information set forth below and to suggest the appropriate disposition.

1. Petitioner kept no books, furnished no explanation of his failure to file returns and adduced no proof at trial. The government's proof was based on the net-worth method; the sufficiency of that proof to support the district court's findings was the primary issue presented by the petition. The facts developed at trial and the applicable law are set forth in the government's memorandum in opposition.

2. Since November 21, 1966, the following additional facts have come to the Solicitor General's attention:

(*a*) In response to a memorandum of October 24, 1966, from the Tax Division of the Department of Justice,[1] the Federal Bureau of Investigation informed the Acting Attorney General, by memorandum of October 28, 1966, that, although petitioner was not the subject of direct electronic surveillance by agents of the F.B.I., he was a participant in various conversations electronically monitored on a number of occasions in 1961. The microphone was installed, by means of a trespass, at a place of business where petitioner and others frequently met. It was believed by the F.B.I. that this establishment was being utilized for purposes connected with organized crime. The Federal Bureau of Investigation, acting on the basis of the Departmental authorization as previously

[1] The memorandum of October 24 was written in connection with the review program described in paragraph 4, *infra*.

described at pages 2–3 of the Supplemental Memorandum for the United States filed in *Black* v. *United States,* Oct. Term, 1965, No. 1029, approved the installation here in question.

(*b*) The substance of the monitored conversations involving petitioner and others was recorded in logs kept by the F.B.I. agents who conducted the electronic surveillance, and was reflected in various F.B.I. reports which came to the attention of those in charge of investigating and prosecuting petitioner for possible tax violations. The reports did not disclose the manner in which the information contained therein had been obtained. Following receipt of the F.B.I.'s memorandum of October 28, 1966, noted above, attorneys of the Department of Justice obtained the relevant F.B.I. logs and examined them in detail in order to make an informed judgment about the matter.

3. Unlike the situation in *Black* v. *United States,* we cannot say in the instant case that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source. Some of the material in the F.B.I. reports (which were based in part on the electronic surveillance) provided investigatory leads and other information used in proceeding against petitioner. Since there was material evidence against petitioner which was tainted, his conviction cannot stand, and no purpose would be served here in having the district court conduct a collateral hearing, such as was suggested by

the government in its memorandum in *Black*.[2] We concede, moreover, that petitioner would have standing to object to the introduction of the evidence obtained as a result of the electronic surveillance. Although he was not the owner of the establishment under surveillance, he was at least an "invitee" on the premises within the meaning of *Jones* v. *United States*, 362 U.S. 257.

4. In view of this Court's supervisory role in the federal judicial system, the Department of Justice believes it appropriate to apprise the Court of its policy in regard to electronic surveillance of the kind here involved. Present governmental practice, adopted in July 1965 in conformity with the policy declared by the President on June 30, 1965, for the entire federal establishment, prohibits such electronic surveillance in all instances except those involving the collection of intelligence with respect to matters affecting national security. Such intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked.[3]

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[2] Following the issuance of the Court's order denying certiorari in this case, the United States Attorney for the Eastern District of New York was advised not to have petitioner apprehended to commence serving his sentence, and petitioner has not in fact been incarcerated.

[3] A memorandum of the Acting Attorney General of November 3, 1966, addressed to all United States Attorneys, summarizes the Department's policy in this regard as follows:

> This Department must never proceed with any investigation or case which includes evidence illegally obtained or

Recognizing its obligation not to use evidence obtained in violation of a defendant's protected rights in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial.[4] Reports of the results of this continuing review are being sent to the Acting Attorney General. Similarly, a careful review of pending and prospective prosecutions is being conducted by the Department for the purpose of determining what other cases might fall within this category. This will necessarily be a time-consuming process but will be diligently pursued to completion. The government will promptly notify the appropriate court when any material discovery is made.[5]

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the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness. We must, also, scrupulously avoid any situation in which an intrusion into a confidential relationship would deny a fair hearing to a defendant or person under investigation.

[4] As the instant case illustrates, problems in this regard may still arise in cases in which some investigation was conducted prior to July 1965.

[5] Action similar to that taken in the *Black* case and in this case has been taken by the government in *DeNiro, et al.* v. *United States*, pending on appeal, Nos. 17,053–17,055, C.A. 6, where the government suggested that the Sixth Circuit remand the cases to the district court.

5. In light of the foregoing, and in view of this Court's decision and *per curiam* opinion in the *Black* case, we suggest that the Court vacate its order denying certiorari, grant certiorari, vacate the judgment of the court of appeals, and remand the cause to the district court for a new trial, should the government seek to prosecute petitioner anew.[6]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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[6] On November 29, 1966, while preparing to file this memorandum, we learned that agents of the Alcohol and Tobacco Tax Division of the Treasury Department had engaged in electronic surveillance of another establishment frequented by petitioner. Logs were not maintained and we are unable at this juncture to provide a full statement of the relevant facts. Although our information is incomplete, it appears that the surveillance lasted for a brief period and that no relevant information relating to petitioner was obtained. Investigation of this matter will be continued and no further prosecution of petitioner will be instituted in advance of its completion. Since, however, the facts stated in the text of this memorandum call, without more, for the disposition which we are suggesting, we are filing the memorandum without further delay. In the event that the government should seek to proceed further against petitioner, all additional information which we obtain will be made known to the district court.

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